INDEX

CITATIONS

Cases:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1091

ELLIOT L. RICHARDSON, SECRETARY OF HEALTH, EDUCATION AND WELFARE,
Appellant

v.

RAYMOND BELCHER, *Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE APPELLEE

OPINION BELOW

The opinion of the district court (Appendix 8-14) is reported at 317 F. Supp. 1294.

JURISDICTION

The judgment of the district court declaring 42 U.S.C. 424a unconstitutional as applied to appellee Raymond Belcher was entered on September 14, 1970 (Appendix 9-16). Notice of appeal was filed on October 13, 1970 (Appendix 16) and probable jurisdiction was noted on March 1, 1971 (Appendix 19). The jurisdiction of this court is conferred by 28 U.S.C. 1252. *Flem-*

ming vs. *Rhodes,* 331 U.S. 100; *Flemming* vs. *Nestor,* 363 U.S. 603, 604-08.

QUESTION PRESENTED

Whether the provisions of Title 42, U.S.C.A. 424(a), Public Law 89-97, Title 3, 335, 79 Stat. 406, and as amended on January 2, 1968, Public Law 90-248, Title 1, 159(a), 81 Stat. 869, commonly referred to as the Social Security Act, and the provisions therein contained requiring the reduction of disability insurance benefits under the Social Security Act of the appellee, Raymond Belcher, because of the simultaneous receipt of West Virginia Workmen's Compensation benefits may be constitutionally applied.

STATUTES AND REGULATIONS INVOLVED

Title 42 U.S.C.A. 424(a), Public Law 89-97, Title 3, 335, 79 Stat. 406, and as amended January 2, 1968, Public Law 90-248, Title 1, 159(a) 81 Stat. 869, and the relevant Department of Health, Education and Welfare regulations set forth in appendix to appellant's brief, Pages 21 to 38.

STATEMENT

Appellee, Raymond Belcher, a resident of West Virginia, was awarded a period of disability with disability insurance benefits commencing in October, 1968, in the amount of $329.70 per month, which included $156.00 per month for himself and $57.90 each for his wife and two children (Appendix 34-38). In January, 1969, the Social Security Administration of the Department of Health, Education and Welfare notified Belcher that $104.40 would be withheld from his monthly Social Security benefits because he was receiving $47.00 a week, or $203.60 a month, in State Workmen's Compensation benefits, thereby reducing his monthly Social Security payments to $225.30 (Appendix 26, 32, 35, 38). Upon reconsideration, the Social Security Administration affirmed the reduction of Belcher's Social Security

benefits on July 19, 1969 (Appendix 33-35).

The appellee requested a hearing. A hearing was held, and the Hearing Examiner of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, upheld the reduction of Belcher's Social Security benefits, pursuant to Section 224 of the Social Security Act, because of his receipts of State Workmen's Compensation benefits (Appendix 36-42). The appellee, Belcher, requested review of the Hearing Examiner's decision on November 3, 1969 (Appendix 42-43), and the Appeals Council of the Bureau of Hearings and Appeals, Social Security Administration, Department of Health, Education and Welfare, denied the appellee's request for review on January 20, 1970 (Appendix 43-44).

Belcher thereafter filed civil action in the United States District Court for the Southern District of West Virginia, at Bluefield, West Virginia, pursuant to 42 U.S.C. 405(g), seeking review of the final administrative decision upholding the reduction of his disability insurance benefits (Appendix 2-5). Belcher alleged that Section 224 of the Social Security Act in applying a formula which takes into consideration benefits received by him from the West Virginia Workmen's Compensation Act is unconstitutional because: (1) it discriminates irrationally between recipients of Workmen's Compensation benefits, whose Social Security benefits are reduced, and all other recipients of benefits or awards, such as private insurance beneficiaries and successful tort plaintiffs whose Social Security benefits are not reduced; (2) it deprives him and his family of property, in the form of Social Security benefits for which he has at least partially paid through Social Security taxes without due process of law; and (3) the Act discriminates against persons in the same class who have periods of disability established prior to June 1, 1965 and those having disability established after June 1, 1965, failing to provide equal protection to all people of the same class (Appendix 3-5).

The District Court, acting on motions for summary judgment by the parties, rendered an opinion that Section 224 cannot be constitutionally applied, since to do so would deprive him of due process and equal protection of the law under the Fifth and Fourteenth Amendments (Appendix 8-14). The District Court thereafter, on September 14, 1970, entered a judgment order reversing the decision of the Secretary of Health, Education and Welfare, applying the offset provisions of Section 224 of the Social Security Act (Appendix 14-15).

SUMMARY OF ARGUMENT

The constitutional validity of Title 42, U.S.C.A., 424(a), is involved and may be found at Public Law 89-97, Title 3, 335, 79 Stat. 406, and amended January 2, 1968, Public Law 90-248, Title 1, 159(a), 81 Stat. 869. The text of this section, with the additions contained in the 1968 amendment, are as follows:

> "(a) If for any month prior to the month in which an individual attains the age of 62 -
>
> (1) such individual is entitled to benefits under Section 423 of this title, and
>
> (2) such individual is entitled for such month, under a Workmen's Compensation law or plan of the United States or a State, to periodic benefits for a total or partial disability (whether or not permanent); and the Secretary has, in a prior month, received notice of such entitlement for such month,
>
> the total of his benefits under Section 423 of this title for such month and of any benefits under Section 402 of this title for such month based on his wages and self-employment income shall be reduced (but not below zero) by the amount by which the sum of -

(3) such total of benefits under Sections 423 and 402 of this title for such month, and

(4) such periodic benefits payable (and actually paid) for such month to such individual under the Workmen's Compensation law or plan, exceeds the higher of -

(5) 80 percentum of his "average current earnings", or

(6) the total of such individual's disability insurance benefits under Section 423 of this title for such month and of any monthly insurance benefits under Section 402 of this title for such month based on his wages and self-employment income, prior to reduction under this section . . .

(Appendix, Appellant's brief, Pages 21 to 22).

The District Court, in holding that Section 224 of the Social Security Act is unconstitutional, stated:

(1) That Belcher, in meeting the requirements of the Social Security Act for disability purposes, established at that time a status or right to the receipt of benefits under said Act which cannot be reduced based on the receipt of monies or benefits from some other source having no relation to the administration of the Social Security Act, such as West Virginia Workmen's Compensation benefits, which is a voluntary plan by Belcher's employer to protect himself and prevent tort actions against him.

(2) That Section 224 of the Social Security Act requires discrimination between two classes of disabled workers essentially indistinguishable from each other, except that one is composed of those disabled persons who also receive Workmen's Compensation benefits, and

the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards, thus the law failing to provide equal protection.

The District Court, in holding Section 224 of the Social Security Act unconstitutional, properly held that *Flemming* vs. *Nestor,* 363 U.S. 603, was inapplicable, or was not to be considered a viable and controlling precedent, especially in view of the more recent holding in the case of *Goldberg* vs. *Kelly,* 379 U.S. 254, thus applying th. aw correctly to the facts and circumstances of the plaintiff-appellee's case.

ARGUMENT

1. THE REDUCTION IN SOCIAL SECURITY BENEFITS REQUIRED BY SECTION 224 OF THE SOCIAL SECURITY ACT DEPRIVES APPELLEE OF A PROPERTY RIGHT IN VIOLATION OF DUE PROCESS.

Section 224(a) of the Social Security Act provides that for any month in which an individual under age sixty-two is entitled to both Social Security benefits and periodic Workmen's Compensation benefits under any federal and state law, such individual's Social Security benefits shall be reduced by the amount by which the total benefits received under the Social Security Act and the Workmen's Compensation program for that month exceeds the higher of: (a) 80% of the individual's "average current earnings"[1]; or (b) the total of certain other designated disability benefits.

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[1] An individual's "average current earnings" is defined as the larger of the average monthly wage used for the purpose of computing his benefits under 42 U.S.C. 423, or 1/60th of his total wages and self-employment income for the five consecutive years after 1950 when they were highest. The 1968 amendments (Public Law 90-248, Title 1, Section 159(a), 81 Stat. 869), changed this clause to

The District Court held that one who has made direct contributions to the Social Security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection for it seems to us to be patently unfair for the welfare recipient under *Goldberg* "to have a property right status" with all the procedural safeguards of due process while the Social Security recipient under *Nestor* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed it appears to run counter to the intent of Congress as reflected by the comments By Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character. Social Security is not a handout, it is not charity, it is not relief. It is an earned right based upon the contributions and earnings of the individual, 102 Congressional Record 15110. The District Court, in rendering its opinion, has said *Nestor* is no longer a viable and controlling precedent, and that this Court in *Goldberg* has said statutory entitlement once met has a property right status which must be protected by due process. The *Goldberg* vs. *Kelly* decision has three areas of tremendous significance: first, it tolls the death knell for right - privilege analysis as a valid test for determining whether governmental benefits can be terminated without a prior administrative hearing and adopts a more sophisticated balancing of interest test to determine the necessity for this prior hearing; second, it

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Footnote 1 continued:
provide that when an individual's wages and self-employment income for the five consecutive years during which they were highest are used to compute his "average current earnings", then his actual earnings, rather than those earnings creditable for purposes of Social Security (which have an upper limit), are to be used.

Section 224(b) provides that, should such an individual receive a lump sum settlement as a substitute for or a commutation of periodic Workmen's Compensation benefits, the reduction "shall be made at such time or times and in such amounts as the Secretary finds will approximate as nearly as practicable the reduction prescribed by subsection (a)."

applies this balancing test to cases of welfare termination or reduction to conclude that due process of law requires a prior hearing consonant with certain procedural due process requirements; thirdly, it is a precedent requiring a hearing before termination of Social Security benefits. If a person is qualified for welfare benefits, such benefits are a matter of statutory entitlement and the relevant constitutional restraints apply. Belcher has contributed 50% of the total amount of tax dollars in the way of Federal Insurance Contributions to the trust fund of the Social Security Act. Congress, in requiring Belcher and his employer to pay taxes into the trust fund, set up certain statutory requirements which Belcher must meet to be eligible to receive benefits from that fund based on disability. To permit the Social Security Administration to administer a fund involving the money of the recipient must require treatment that once he meets the statutory requirements, some other program having no logical connection or relation may not take away his benefits so long as he remains within the statutory requirements of disability under the Act. To permit the Legislature of West Virginia in establishing a Workmen's Compensation plan and fixing the weekly or monthly benefits thereunder, either on a compulsory or voluntary basis, would have the effect of permitting the Legislature of West Virginia under the application of Section 224 of the Social Security Act to determine the monthly amount of Social Security entitlement a recipient would receive once you have met the disability requirements of the Act. In other words, when the Legislature of West Virginia increases or decreases Workmen's Compensation benefits, it would increase or decrease Social Security benefits of a person eligible to receive benefits thereunder, and the Secretary of the Department of Health, Education and Welfare would have no control over this, under the application of Section 224. It would be equally true for the Legislature of West Virginia, or of the several states, under the application of Section 224 of the Social Security Act to reduce Workmen's Compensation benefits on a weekly or

monthly basis to require maximum benefits to be paid under the administration of the Social Security Act. Surely Congress did not intend that Section 224 should have such application, and surely Congress did not intend that the several State Legislatures should determine the monthly amount a disabled Social Security recipient is entitled to. Nevertheless, that is the hard cold facts. To permit some other legislative body to take action which would reduce or increase monthly benefits to which a disabled Social Security recipient is entitled to from a fund to which he has contributed his own money is the taking of property without due process of law in its worst form.

The appellant argues that Section 224 has a reasonable basis and may be constitutionally applied. The District Court, in answer to this, stated:

> "However, we are not convinced that the issue raised in this case deserves such cavalier treatment, especially in view of the more recent decision of the Supreme Court in *Goldberg* vs. *Kelly,* 397 U.S. 250 (1970), which tends to elevate entitlement to welfare to the status of a property right and to surround it with all the safeguards required by due process. Such benefits, the Court states (page 262), are a matter of 'statutory entitlement for persons qualified to receive them,' and as support for this conclusion, the Court, in footnote 8 of the same page, refers to an article in the Yale Law Review stating that,
>
> > 'It may be realistic today to regard welfare entitlement as more like 'property' than a 'gratuity'.
>
> Therefore, since the Court in *Goldberg* appears to have determined that entitlement to welfare is in the nature of a property right, protected by the Due Process Clause of the Fifth Amendment, by the same rationale it must be deter-

mined that one who has made direct contribution to the Social Security fund and becomes entitled to disability benefits thereunder should and ought to be accorded equal status and protection. For it seems to us to be patently unfair for the welfare recipient under *Goldberg* to have 'property right status' with all the procedural safeguards of due process, while the Social Security recipient, under *Nestor,* is deprived of such status and protection. The distinction is not only completely illogical, but is grossly inequitable. Indeed, it appears to run counter to the intent of Congress as reflected by the comments by Senator George, Chairman of the Senate Finance Committee, at the time of the passage of the Social Security Act concerning its purpose and character, as quoted in the *Nestor* dissent, page 623:

> 'It comports better than any substitute we have discovered with the American concept that free men want to *earn* their security and not ask for doles - that what is due as a matter of *earned right* is far better than a gratuity . . . (Emphasis added).
>
> '*Social Security is not a handout; it is not charity; it is not relief.* It is an *earned right* based upon the contributions and earnings of the individual. As an *earned right,* the individual is eligible to receive his benefit in dignity and self-respect.' (Emphasis added) 102 Cong. Rec. 15110.'

Thus, we must conclude that the concept espoused by the majority in *Nestor,* that one who has contributed to the Social Security fund and later becomes eligible to receive the benefits provided by the Social Security Act has no indefeasible property right to such benefits, is no longer to be considered a viable and

controlling precedent for that principle, in view of the more recent holding in *Goldberg* that a welfare recipient who has made no direct contribution to the fund from which he draws benefits does have a recognizable property right to such benefits and one which is protected by all the safeguards of due process." (Appendix 11-12).

It is submitted that Section 224 of the Social Security Act is contrary to the very purpose of the Social Security Act and bears no rational relation to its purpose, and that Section 224 of said Act operates to the detriment of persons who are to be benefited by the Social Security Act, and thus subverts the very objective that it is intended to serve, violates due process, and this appears to be abundantly clear from a close reading of the dissent in the *Flemming* vs. *Nestor* case. The Fifth Amendment to the Constitution of the United States of America provided in pertinent part that "no person shall . . . be deprived of life, liberty, or property without due process of law . . .".

It, therefore, would seem abundantly clear that if a welfare recipient who has met statutory entitlement is protected by the due process clause of the Fifth Amendment, then surely the Social Security recipient should and must be afforded the same protection, especially in view of the fact that theoretically he has contributed 50% of the trust fund set up by the Social Security Act.

II. THE REDUCTION IN SOCIAL SECURITY BENEFITS REQUIRED BY SECTION 224 OF THE SOCIAL SECURITY ACT DEPRIVES APPELLEE OF EQUAL PROTECTION UNDER THE LAW.

The appellee contends that the offset provisions of Section 224 creates arbitrary discrimination between two classes of disabled workers, essentially indistinguishable from each other, except that one is composed of those disabled persons who also receive Workmen's

Compensation benefits, and the other is composed of those disabled persons who also receive benefits from private disability insurance plans or tort claim awards; and that on the basis of this difference alone, the first class has benefits reduced, while the second class has benefits left untouched. The appellee further argues that the offset provisions also discriminates between those persons who were disabled prior to June 1, 1965 and those who became disabled after June 1, 1965.

Section 224 of the Social Security Act provides where an individual under age sixty-two is entitled to disability Social Security benefits and is also entitled to benefits under a Workmen's Compensation law or plan of the United States or a State to periodic benefits for a total or partial disability, whether or not permanent, then such disability recipient shall have his benefits reduced by the formula set forth in Section 224. Section 224 of the Social Security Act does not include any other plan other than a Workmen's Compensation law or plan of the United States or of a State, thus restricting its application to a segment of disabled persons that might be receiving benefits under a Workmen's Compensation plan, either of State or Federal in nature. The appellee contends that the Act discriminates against him and does not provide equal protection to him, in that other disabled persons in the same class may be drawing the same benefits from a private insurance source or from a tort claim award, and yet the law could not apply to him in reducing his Social Security benefits commensurate with your appellee. The appellant argues that the purpose of Section 224 of the Social Security Act was to avoid duplication of public benefits. The appellee would have no argument with the appellant's statement if the benefits he was receiving from the West Virginia Workmen's Compensation Fund was a public benefit. The West Virginia Compensation Act, Chapter 23, Article 2, Section 1 (infra this brief, Appendix, P. 14-24), makes it abundantly clear that no public funds are involved, as the premiums paid into the fund are paid by

the employer and are part of the contract of employment of the appellee. *Goding* vs. *Ott,* 77 W.Va. 487, 87 S.E. 862; *Landcaster* vs. *State Compensation Commissioner,* 125 W.Va. 190, 23 S.E. 2d 601; *Harden* vs. *Workmen's Compensation Appeal Board,* 118 W.Va. 198, 189 S.E. 670.

The District Court, in answer to the appellant's justification of these discriminatory features of the offset provisions of Section 224 of the Social Security Act was to avoid duplication of public benefits, stated:

> "If this be its true purpose, it is certainly a laudable one, and one with which this Court could wholeheartedly accept; however, the argument is inapplicable here, for, as previously shown, Workmen's Compensation in West Virginia is not a gift from the public largesse, but rather is an entitlement arising from a contractual relationship between employer and employee, sanctioned by law, whereby each gave up a legal right in return for a concomitant legal benefit. That no public funds are involved is made abundantly clear by the provisions of West Virginia Code, 23-3-1. And, it is provided that the Workmen's Compensation Fund shall be supported by 'premiums and other funds paid thereto by employers', from which shall be paid all benefits due the employees or their dependents and the expenses of administering the law. No public funds being thus involved, the defendant's (appellant added) argument that plaintiff's Workmen's Compensation award should be treated as a public benefit obviously becomes quite untenable and must be rejeceted".

Although the Fifth Amendment to the Constitution of the United States of America does not specifically contain an equal protection clause, it does provide a restraining and protecting effect on Federal government

action which forbids discrimination that is so unjustifiable as to violative of due process. *Boling* vs. *Sharp,* 347 U.S. 497, 74 Sup. Ct. 693; *Schneider* vs. *Rusk,* 377 U.S. 163. And this same limitation is placed upon the States by the Fourteenth Amendment to the Constitution of the United States of America, which bars any State from similarly depriving a person of his property without due process of law, or acts to discriminatory as to amount to violation of due process of law.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed and the application of Section 224 of the Social Security Act cannot be applied, since to do so would deprive the appellee of his property without due process of law and deprive the appellee of equal protection under the law as contained in the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

Respectfully submitted,

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APPENDIX

W. Va. Code, Chapter 23, Article 2, provides:

Section 1. Employers and Employees, including State, Its Agencies and Political Subdivisions Subject to Chapter.—The state of West Virginia and all governmental agencies or departments created by it, including county boards of education, are hereby required to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of their employees, and shall be subject to all requirements of this chapter, and all rules and regulations prescribed by the commissioner with reference to rates, classification and premium payments.

All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry, service or business in this state, including county courts, municipalities, other political subdivisions of the state, and civil defense organizations organized under article five, chapter fifteen of this code, are employers within the meaning of this chapter and subject to its provisions: Provided, That the provisions of section eight, article two of this chapter shall not apply to such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid: Provided, however, That the failure of such county courts, municipalities, other political subdivisions of the state, or civil defense organizations organized as aforesaid, to elect to subscribe to, and to pay premiums into, the workmen's compensation fund, shall not impose any liability upon them, or either of them, other than such liability as would exist notwithstanding the provisions of this chapter. All persons in the service of employers as herein defined, and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged, including persons regularly employed in the state whose duties necessitate employment of a temporary or transitory nature by the same employer without the state, and

check-weighmen employed according to law, all members of rescue teams assisting in mine accidents with the consent of the owner who, in such case, shall be deemed the employer, or at the direction of the director of the department of mines, and all forest fire fighters who, under the supervision of the director of the department of natural resources or his designated representative, assist in the prevention, confinement and suppression of any forest fire, are employees within the meaning of this chapter and subject to its provisions: Provided further, That this chapter shall not apply to employers of employees in domestic service or persons whose employment is prohibited by law, nor to employees of an employer while employed without the state, except in case of temporary employment without the state as hereinbefore provided; nor shall a member of a firm of employers, or any official of an association or of a corporate employer, including managers, or any elective or appointive official of the state, county, county court, board of education, municipality, other political subdivision of the state, or civil defense organization organized as aforesaid, whose term of office is definitely fixed by law, be deemed an employee within the meaning of this chapter: And provided further, That employers of not more than three employees for a period of not more than one month, who shall be called herein "casual employers", employers of employees in agricultural service and duly incorporated volunteer fire departments or companies may voluntarily elect to subscribe to, and pay premiums into, the workmen's compensation fund for the protection of the employees of such employers and all of the members, including the chief, commander or other officials thereof, of such duly incorporated volunteer fire departments or companies, and in such case shall be subject to all requirements of this chapter and all rules and regulations prescribed by the commissioner with reference to rates, classifications and premium payments, but such casual employers, employers of employees in agricultural service and duly incorporated volunteer fire departments or companies shall not be required to subscribe to the workmen's com-

pensation fund and their failure to subscribe to such fund shall not impose any liability upon them other than such liability as would exist notwithstanding the provisions of this chapter; nor shall the provisions of section eight of this article apply to casual employers, employers of employees in agricultural service or to such duly incorporated volunteer fire departments or companies.

The premium and actual expenses in connection with governmental agencies and departments of the state of West Virginia shall be paid out of the state treasury from appropriations made for such agencies and departments, in the same manner as other disbursements are made by such agencies and departments.

County courts, municipalities, other political subdivisions of the state, county boards of education, civil defense organizations organized as aforesaid, any duly incorporated volunteer fire departments or companies which shall elect to become subscribers to the workmen's compensation fund shall provide for the funds to pay their prescribed premiums into the fund, and such premiums, and premiums of state agencies and departments, including county boards of education, shall be paid into the fund in the same manner as herein provided for other employers subject to this chapter. In addition to its usual and ordinary meaning, the term "Employer" or "employers", as used in this chapter, shall be taken to extend to and include any duly incorporated volunteer fire department or company, or civil defense organization organized as aforesaid, which shall elect to subscribe to, and pay premiums into, the workmen's compensation fund, and in addition to its usual and ordinary meaning, the term "Employee" or "Employees", as used in this chapter, shall be taken to extend to and include all of the members of any such department, company or organization. All duly incorporated volunteer fire departments or companies, and civil defense organizations organized as aforesaid, which shall elect to subscribe to, and pay premiums into, such fund, shall be placed in a separate group or class of subscribers

to be established by the commissioner, and such departments, companies or organizations shall pay into the fund such premiums (computed, notwithstanding the provisions of section five of this article on such basis as to the commissioner shall seem right and proper) as may be necessary to keep such group or class entirely self-supporting.

Any employer whose employment in this state is to be for a definite or limited period, which could not be considered "regularly employing" within the meaning of this section, may elect to pay into the workmen's compensation fund the premiums herein provided for, and at the time of making application to the commissioner such employer shall furnish a statement under oath showing the probable length of time the employment will continue in this state, the character of the work, an estimate of the monthly payroll, and any other information which may be required by the commissioner. At the time of making application such employer shall deposit with the state compensation commissioner to the credit of the workmen's compensation fund the amount required by section five of this article, which amount shall be returned to such employer, if his application be rejected by the commissioner. Upon notice to such employer of the acceptance of his application by the commissioner, he shall be an employer within the meaning of this chapter and subject to all of its provisions.

Any foreign corporation employer electing to comply with the provisions of this chapter and to receive the benefits hereunder, shall, at the time of making application to the commissioner, in addition to other requirements of this chapter, furnish such commissioner with certificate from the secretary of state showing that it has complied with all the requirements necessary to enable it legally to do business in this state, and no application of such foreign corporation employer shall be accepted by the commissioner until such certificate is filed.

For the purpose of this chapter, a mine shall be adjudged within this state when the main opening, drift, shaft or slope is located wholly within this state.

Any employee within the meaning of this chapter whose employment necessitates his temporary absence from this state in connection with such employment, and such absence is directly incidental to carrying on an industry in this state, who shall have received injury during such absence in the course of and resulting from his employment, shall not be denied the right to participate in the workmen's compensation fund.

Sec. 6. Exemption of Contributing Employers from liability. — Any employer subject to this chapter who shall elect to pay into the workmen's compensation fund the premiums provided by this chapter shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring, after such election and during any period in which such employer shall not be in default in the payment of such premiums and shall have complied fully with all other provisions of this chapter: Provided, That the injured employee has remained in his service with notice that his employer has elected to pay into the workmen's compensation fund the premiums provided by this chapter. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action as aforesaid, which the employee or his or her parents would otherwise have.

Sec. 6-a. Exemption from Liability of Officers, Managers, Agents, Representatives or Employees of Contributing Employers.—The immunity from liability set out in the preceding section shall extend to every officer, manager, agent, representative or employee of such employer when he is acting in furtherance of the employer's business and does not inflict an injury with deliberate intention.

Sec. 7. Notice to Employees; Waiver of Benefits of Chapter by Contract Prohibited.—Each employer electing to pay the premiums provided by this chapter into the workmen's compensation fund, or electing to make direct payments of compensation as hereinafter provided, shall post and keep posted in conspicuous places about his place or places of business typewritten or printed notices stating the fact that he has made such election, and the same when so posted shall constitute sufficient notice to all his employees and to parents of any minor employees of the fact that he has made such election. No employer or employee shall exempt himself from the burden or waive the benefits of this chapter by any contract, agreement, rule, or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void.

Sec. 8. Election Not to Pay or Default in Payment of Premiums; Defenses Prohibited.—All employers subject to this chapter, except the state of West Virginia and the governmental agencies or departments created by it, who shall not have elected to pay into the workmen's compensation fund the premiums provided by this chapter and have not elected to pay individually and directly or from benefit funds compensation and expenses to injured employees or fatally injured employees' dependents under the provisions of section nine of this article, or having so elected shall be in default in the payment of the same, or not having otherwise fully complied with the provisions of section five or section nine of this article, shall be liable to their employees (within the meaning of this article) for all demages suffered by reason of personal injuries sustained in the course of employment caused by the wrongful act, neglect or default of the employer or any of the employer's officers, agents or employees while acting within the scope of their employment and in the course of their employment and also to the personal representative of such employees where death results from such personal injuries, and in any action by any such employee or personal representative thereof, such defendant shall not avail himself of the following common

law defenses: The defense of the fellow - servant rule; the defense of the assumption of risk; or the defense of contributory negligence; and further shall not avail himself of any defense that the negligence in question was that of some one whose duties are prescribed by statute: Provided, however, That such provision depriving a defendant employer of certain common law defenses under the circumstances therein set forth shall not apply to an action brought against a county court, board of education, municipality, or other political subdivision of the state or against a casual employer or an employer of employees in agricultural service.

Sec. 9. Election of Employer to Provide Own System of Compensation.—Notwithstanding anything contained in this chapter, employers subject to this chapter who are of sufficient financial responsibility to insure the payment of compensation to injured employees and the dependents of fatally injured employees, whether in the form of pecuniary compensation or medical attention, funeral expenses or otherwise as herein provided of the value at least equal to the compensation provided in this chapter, or employers of such financial responsibility who maintain their own benefit funds, or system of compensation, to which their employees are not required or permitted to contribute, or such employers as shall furnish bond or other security to insure such payments, may, upon a finding of such facts by the compensation commissioner, elect to pay individually and directly, or from such benefit funds, department or association, such compensation and expenses to injured employees or fatally injured employees' dependents. The compensation commissioner shall require security or bond from such employer, to be approved by him, and of such amount as is by him considered adequate and sufficient to compel or secure to such employees, or their dependents, payment of the compensation and expenses herein provided for, which shall in no event be less than the compensation paid or furnished out of the state workmen's compensation fund in similar cases to injured employees or the dependents of fatally

injured employees whose employers contribute to such fund. Any employer electing under this section shall on or before the twentieth day of the first month of each quarter, for the preceding quarter, file with the commissioner a sworn statement of the total earnings of all his employees subject to this chapter for such preceding quarter, and shall pay into the workmen's compensation fund a sum sufficient to pay his proper proportion of the expenses of the administration of his chapter, as may be determined by the commissioner. The commissioner shall make and publish rules and regulations governing the mode and manner of making application, and the nature and extent of the proof required to justify the finding of facts by the commissioner, to consider and pass upon such election by employers subject to this chapter, which rules and regulations shall be general in their application. Any employer subject to this chapter who shall elect to carry his own risk and who has complied with the requirements of this section and the rules of the compensation commissioner shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however, occurring, after such election and during the period that he is allowed by the commissioner to carry his own risk; provided the injured employee has remained in his service with notice given, as provided for in section seven of this article, that his employer has elected to carry his own risk as herein provided. The continuation in the service of such employer with such notice shall be deemed a waiver by the employee and by the parents of any minor employee of the right of action, as aforesaid, which the employee or his or her parents would otherwise have.

Any employer whose record upon the books of the compensation commissioner shows, a liability against the workmen's compensation fund incurred on account of injury to or death of any of his employees, in excess of premiums paid by such employer, shall not be granted the right, individually and directly or from such benefit funds, department or association, to compensate his injured employees and the dependents of his fatally injured

employees until he has paid into the workmen's compensation fund the amount of such excess of liability over premiums paid, including his proper proportion of the liability incurred on account of explosions, catastrophes or second injuries as defined in section one, article three of this chapter; occurring within the state and charged against such fund.

All employers who have heretofore elected, or shall hereafter elect, to pay compensation and expenses directly as provided in this section, shall, unless they give the catastrophe and second injury security or bond hereinafter provided for, pay into the surplus fund referred to in section one, article three of this chapter upon the same basis and in the same percentages, subject to the limitations herein set forth, as funds are set aside for the maintenance of the surplus fund out of payments made by premium-paying subscribers, such payments to be made at the same time as hereinbefore provided with respect to payment of proportion of expenses of administration. In case there be a catastrophe or second injury, as defined in section one, article three of this chapter, to the employees of any employer making such payments, the employer shall not be liable to pay compensation or expenses arising from or necessitated by the catastrophe or second injury, and such compensation and expenses shall not be charged against such employer, but such compensation and expenses shall be paid from the surplus fund in the same manner and to the same extent as in the case of premium-paying subscribers.

If an employer elects to make payments into the surplus fund as aforesaid, then the bond or other security required by this section shall be of such amount as the commissioner considers adequate and sufficient to compel or secure to the employees or their dependents payment of compensation and expenses, except any compensation and expenses that may arise from, or be necessitated by, any catastrophe or second injury, as defined in section one, article three of this chapter, which last are secured

by and shall be paid from the surplus fund as hereinbefore provided.

If any employer elect not to make payments into the surplus fund, as hereinbefore provided, then, in addition to bond or security in the amount hereinbefore set forth, such employer shall furnish catastrophe and second injury security or bond, approved by the commissioner, in such additional amount as the commissioner shall consider adequate and sufficient to compel or secure payment of all compensation and expenses arising from, or necessitated by, any catastrophe or second injury that might thereafter ensue.

All employers hereafter making application to carry their own risk under the provisions of this section, shall with such application, make a written statement as to whether such employer elects to make payments aforesaid into the surplus fund, or not to make such payments and to give catastrophe and second injury security or bond hereinbefore in such case provided for.

All employers who have heretofore elected to carry their own risk under the provisions of this section shall be deemed to have elected to make payments into the surplus fund unless, within thirty days after the effective date of this act, they notify the commissioner in writing to the contrary: Provided, however, That such employers, as have heretofore elected, under the rules heretofore promulgated by the commissioner, not to make payments into the surplus fund, shall be deemed to have elected to give the catastrophe and second injury security or bond hereinbefore provided for and not to make payments into the surplus fund. Any catastrophe and second injury security or bond heretofore gives under rules and regulations promulgated by the commissioner and approved by him shall be valid under this section, and any election heretofore made under the rules and regulations of the commissioner to make payments into the surplus fund shall be valid and protective to the person so electing

from and after the date of such election.

In any case under the provisions of this section that shall require the payment of compensation or benefits by an employer in periodical payments, and the nature of the case makes it possible to compute the present value of all future payments, the commissioner may in his discretion, at any time compute and permit or require to be paid into the workmen's compensation fund an amount equal to the present value of all unpaid compensation for which liability exists, in trust; and thereupon such employer shall be discharged from any further liability upon such award, and payment of the same shall be assumed by the Workmen's Compensation Fund.